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FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender*

I. LEGISLATIVE CHANGES

THE sixty-ninth session of the Texas Legislature, as predicted,¹ made many changes to those sections of the Texas Family Code relating to child support.² The legislature made the changes in order to conform the Family Code to the requirements of the Child Support Enforcement Amendments of 1984.³ One of the major changes requires the withholding of wages for child support in most cases.⁴ Withholding for child support will likely become as familiar as withholding portions of income for payment of federal income tax. The legislature revised and reorganized chapter 14 of the Family Code. Chapter 14 is now subdivided into three sections: A. Establishment and Modification;⁵ B. Enforcement of Court Orders for Child Support and Possession of and Access to a Child;⁶ C. Model Interstate Income Withholding Act.⁷

Subchapter A provides in part that the duty to pay child support continues until the child completes high school.⁸ Thus, the custodian of a child who is fully enrolled in an accredited high school can continue to receive court-ordered child support even though the child is eighteen years of age or older.⁹ This provision should affect many Texas children, since a child often reaches eighteen years of age prior to graduation from high school. The

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1. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 39 Sw. L.J 43, 43 (1985), in which the author stated that, since the 1983 Texas child support collection legislation failed to comply with federal law, further changes were necessary.

2. See TEX. FAM. CODE ANN. §§ 14.05, .30-.43 (Vernon Pam. Supp. 1986).

3. Pub. L. No. 98-378, 98 Stat. 1305 (withholding of wages to collect delinquent child support). The Child Support Enforcement Amendments of 1984 provide for wage withholding if support payments are late. See *id.* sec. 3(b), § 466(a)(1), (b)(2), 98 Stat. at 1306-08.

4. See TEX. FAM. CODE ANN. § 14.05(e) (Vernon Pam. Supp. 1986) (court will not order income withholding if party shows good cause for nonwithholding).

5. *Id.* §§ 14.01-.13.

6. *Id.* §§ 14.30-.51.

7. *Id.* §§ 14.61-.71.

8. *Id.* § 14.05(a). Previously a court could only order an obligor to pay child support until the child reached eighteen years of age, unless the child required continuous supervision and care or could not support himself. Act of June 15, 1973, ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1414, amended by Act of June 15, 1985, ch. 802, § 10, 1985 Tex. Sess. Law Serv. 6050, 6057 (Vernon).

9. TEX. FAM. CODE ANN. § 14.05(c) (Vernon Pam. Supp. 1986).

statute applies to modifications as well as to new support orders.¹⁰

While the legislature modified existing law to permit the continuation of child support until graduation from high school, the legislature codified rather than expanded case law relating to the support of handicapped children.¹¹ In *Red v. Red*¹² the Texas Supreme Court held that, unless prior to the time the handicapped child reaches eighteen an order for support of the handicapped child past eighteen is present in either the original or modification decree, the court that entered the divorce decree has no jurisdiction over child support.¹³ The legislature has codified this decision in subchapter A.¹⁴ The statute now provides that a handicapped child who is eighteen or older may receive child support only if the managing conservator either requests extended support in the original suit, petitions for further action under section 11.07¹⁵ of the Family Code, or, prior to the child's eighteenth birthday, files a motion to modify under section 14.08¹⁶ of the Family Code.¹⁷

Although most of the rules concerning enforcement of child support orders are contained in subchapter B,¹⁸ a number of provisions remain in subchapter A¹⁹ because of the number of changes the legislature made with regard to child support. Both subchapters contain provisions concerning the most important change in procedure, income withholding.²⁰ Soon, payroll computers will be programmed to include this possibility and applications for jobs will include places to check and blanks to fill in concerning the fact and the amount of child support.²¹

Under subsection B when the obligor is behind in his payments the remedies of contempt²² and a judgment for the amount owed²³ are available to the obligee or managing conservator. If the managing conservator has voluntarily allowed the possessory conservator to retain possession of the child for periods in excess of the court-ordered time period and the possessory conservator is able to show actual support of the child, then the possessory conservator may have a defense to a charge that he owes support.²⁴ An

10. Act of June 15, 1973, ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1414, *amended by* Act of June 15, 1985, ch. 802, § 10, 1985 Tex. Sess. Law Serv. 6050, 6057 (Vernon).

11. See TEX. FAM. CODE ANN. § 14.05(b) (Vernon Pam. Supp. 1986).

12. 552 S.W.2d 90 (Tex. 1977); see Solender, *Family Law: Parent and Child*, *Annual Survey of Texas Law*, 31 Sw. L.J. 133, 144 (1977).

13. 552 S.W.2d at 92.

14. TEX. FAM. CODE ANN. § 14.05(b) (Vernon Pam. Supp. 1986).

15. *Id.* § 11.07.

16. *Id.* § 14.08.

17. *Id.* § 14.05(b).

18. *Id.* §§ 14.30-.51.

19. For example, one will need to consider the guidelines governing the amount of support, adopted by the Texas Supreme Court, while writing the original decree. *Id.* § 14.05(a). The legislature has changed the notice rules with regard to motions to modify, to conform with the Texas Rules of Civil Procedure. *Id.* § 14.08(b).

20. *Id.* §§ 14.05(e), 14.43(a).

21. The Texas Attorney General's office has published a form court order for withholding child support from earnings.

22. TEX. FAM. CODE ANN. § 14.40 (Vernon Pam. Supp. 1986); see *id.* § 14.31(d) (if contempt under § 14.40 is only remedy sought, petitioner need only give ten days' notice).

23. *Id.* § 14.41.

24. *Id.* § 14.41(c).

obligor may plead this defense in either a contempt²⁵ or a judgment²⁶ hearing. In addition to including provisions for the enforcement of child support payments, the legislature in subsection B made changes in the wording of the Code provisions either to clarify²⁷ or to conform the provisions to case law.²⁸

In addition to requiring child support payments, most decrees contain orders concerning the right to possession of and access to the child by the obligor or possessory conservator. Since the legislature has created so many remedies for the failure to pay, it has tried to create some balance by providing provisions for the enforcement of visitation orders.²⁹ The courts now have explicit contempt powers for the enforcement of court-ordered visitation.³⁰ In addition to or instead of contempt, the court may order the person denying access to the child to post a bond to insure compliance with its orders.³¹

The question of standing either to bring or to intervene in a suit concerning the parent-child relationship has caused confusion for some time.³² In response to this problem the legislature completely revised the section that specifies the standing requirement.³³ The legislature eliminated the phrase "any person with an interest in the child"³⁴ and replaced it with a list of people who have standing.³⁵ Some persons are accorded an absolute right to sue,³⁶ while others may do so only in particular situations.³⁷ The legislature

25. *Id.* § 14.40(c).

26. *Id.* § 14.41(c). The child support order continues unchanged until further order of the court, but the obligor may seek reimbursement for his support as a counterclaim or offset against the claim of the managing conservator. *Id.*

27. *See id.* §§ 14.40(d), 41(d). The court may not reduce or modify child support arrearages during either contempt or judgment hearings. *Id.*

28. *See id.* § 14.41(b). This section provides a ten-year statute of limitations for suits seeking judgments for arrearages. The courts first held that the ten-year statute of limitations applied in *Huff v. Huff*, 648 S.W.2d 286, 289-90 (Tex. 1983). In addition to *Huff*, the legislature added § 14.41(b), which further limits the possibility for collecting arrearages, stating that the court no longer has jurisdiction two years after the child becomes an adult or the support obligation terminates. TEX. FAM. CODE ANN. § 14.41(b) (Vernon Pam. Supp. 1986).

29. *See* TEX. FAM. CODE ANN. § 14.50 (Vernon Pam. Supp. 1986).

30. *Id.*

31. *Id.* § 14.51.

32. *See, e.g.,* *Pratt v. Texas Dep't of Human Resources*, 614 S.W.2d 490, 494-95 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (former foster parent could not bring suit); *Watts v. Watts*, 573 S.W.2d 864, 866 (Tex. Civ. App.—Fort Worth 1978, no writ) (grandfather could bring suit since he was affected by order of conservatorship); *Glover v. Moore*, 536 S.W.2d 78, 80 (Tex. Civ. App.—Eastland 1976, no writ) (biological mother whose rights had been terminated could not bring suit).

33. *Compare* Act of June 15, 1973, ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1412, *amended by* Act of June 15, 1985, ch. 802, § 1, 1985 Tex. Sess. Law Serv. 6050, 6050 (Vernon), *with* TEX. FAM. CODE ANN. § 11.03 (Vernon Pam. Supp. 1986).

34. Act of June 15, 1985, ch. 802, § 1, 1985 Tex. Sess. Law Serv. 6050, 6050-54 (Vernon).

35. TEX. FAM. CODE ANN. § 11.03 (Vernon Pam. Supp. 1986).

36. *Id.* § 11.03(a)(1)-(6). These people include the parents, the child through a court-appointed representative, a custodian or person who has the right of visitation, a guardian, a governmental entity, or any authorized agency. *Id.*

37. *Id.* § 11.03(a)(7)-(9). These people include the alleged father of an illegitimate child if the father files under chapter 13 of the Code, a person who has actual possession and control of the child for six months or more before the filing of a petition, or a person given managing

also granted grandparents the right, under limited circumstances, to bring an original suit when seeking to obtain managing conservatorship or access to their grandchildren.³⁸ The legislature also included a list of persons who have standing to initiate adoption proceedings³⁹ as well as a list of those who cannot file a suit affecting the parent-child relationship after the court has terminated that relationship.⁴⁰

The Code changes also addressed venue.⁴¹ The legislature specified that divorce venue controls when parties file both a divorce suit and a suit affecting the parent-child relationship in different counties or at different times.⁴² The legislature changed the language of this section to make it clear that the section concerns venue in an original suit only and not continuing jurisdiction, which is another subject altogether.⁴³

Although the legislature raised many fees,⁴⁴ it did not require any additional filing fees in certain suits affecting the parent-child relationship.⁴⁵ These suits include modification or enforcement of prior child support or custody orders.⁴⁶ The clerk may, however, collect a deposit at the time of filing to cover the costs and expenses that arise from the proceeding.⁴⁷

Although the Texas Legislature made many other changes in the Family Code, the addition to the chapter concerning consent to medical treatment⁴⁸ deserves special comment. The legislature has increased the list of treatments to which a minor may have access without parental consent.⁴⁹ The minor may now obtain mental health treatment without parental consent if he is a victim of physical or sexual abuse, or if he is contemplating suicide.⁵⁰ This new right could be important provided sufficient public health facilities are available to the minor for the exercise of the right.

II. STATUS

Legal paternity, while more difficult to establish than biological parentage,

conservatorship of the child under § 15.03 of the Code or a person given consent to adopt under § 16.05 of the Code. *Id.*

38. *Id.* § 11.03(b), (c). After a party files for divorce the grandparents have standing to intervene and the court may appoint them as managing conservators if the court finds that this move is in the best interest of the children. *Young v. Young*, 693 S.W.2d 696, 698 (Tex. App.—Houston [14th Dist.] 1985, writ *dism'd*).

39. TEX. FAM. CODE ANN. § 11.03(d) (Vernon Pam. Supp. 1986). These persons include stepparents, an adult who has possession of the child, as a result of adoption placement, thirty days prior to the filing of a petition, an adult who has possession of the child for two months during a three-month period prior to the filing of a petition, or an adult whom the court holds had substantial past contact with the child. *Id.*

40. *Id.* § 11.03(g).

41. *Id.* § 11.04.

42. *Id.* § 11.04(a)(2).

43. *Id.* § 11.05.

44. *See id.* § 11.171 (raises filing fees in adoption suits by additional \$15 to pay for central record file).

45. *Id.* § 14.13.

46. *Id.*

47. *Id.*

48. *Id.* §§ 35.01, .03, .04.

49. *Id.* § 35.03.

50. *Id.*

is an essential basis for a child support order.⁵¹ In *J.M.R. v. A.M.*⁵² the child was allegedly the product of a liaison between a New York mother and a Texas father. The mother tried twice in the New York courts to establish paternity, but was unsuccessful each time because the New York courts lacked personal jurisdiction over the alleged father. The mother then filed in Texas and, following the statutory procedures in the Texas Family Code,⁵³ established that J.M.R. was the father.

The father appealed, claiming that the Texas court did not have personal jurisdiction because the child had no significant connection with Texas. The father relied on *Alberts v. Ames*,⁵⁴ which held that Texas did not have jurisdiction since Texas was not the home state of the mother and child.⁵⁵ The *Alberts* court, while stating that Colorado did have jurisdiction over the father, did not establish whether that jurisdiction was personal jurisdiction.⁵⁶ In *J.M.R.* the court doubted that the state of domicile of the mother and child would have jurisdiction of a foreign father in a paternity action.⁵⁷ Since the mother could not seek relief in her home state, the *J.M.R.* court examined Texas law to determine if any basis existed for taking jurisdiction.⁵⁸ While the court found no specific statutory authority for jurisdiction of a paternity action,⁵⁹ the court reasoned that the legislature could not limit the constitutional authority of district courts.⁶⁰ Hence the court held that a "[s]uit to establish paternity and support is a suit in personam, is transitory in nature, and may be maintained wherever a defendant is found."⁶¹ *J.M.R.* also held that the trial court did not abuse its discretion by ordering child support payments of \$1,100 per month.⁶² The court considered three factors

51. *Ex parte* Riley, 691 S.W.2d 16, 18 (Tex. App.—Beaumont 1985, no writ). The court held that it could not enforce an order by contempt since the previous order made no finding of a parent-child relationship; thus, although the court appointed the natural father possessory conservator, the court could not order him to pay support. *Id.* The dissent believed that the reasoning of the court was technical and that the previous court, by issuing the child support decree, made a determination that the natural father was a parent. *Id.* at 20 (Brookshire, J., dissenting).

52. 683 S.W.2d 552 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

53. See TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Pam. Supp. 1986).

54. 616 S.W.2d 653 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

55. *Id.* at 654. In *Albers* the mother first brought her paternity suit in a Colorado court. The court dismissed the suit because it did not have personal jurisdiction of the father, who lived in Texas. The mother then filed her suit in Texas. The Houston court of appeals held that Texas did not have jurisdiction since the child had never been to Texas and since neither the child nor the mother had a significant connection with Texas. *Id.* at 654-55. The court stated that Colorado now had jurisdiction over the alleged father since Colorado had adopted the Uniform Child Jurisdiction Act and other relevant statutes. *Id.* at 655.

56. The father did not live in Colorado as a resident. *Id.* at 655.

57. 683 S.W.2d at 556.

58. *Id.* at 557-58.

59. *Id.* The court stated that New York, unlike Colorado in *Albers*, could probably not obtain personal jurisdiction under its long-arm statute. *Id.* at 556.

60. *Id.* at 557.

61. *Id.* The *J.M.R.* court's holding is certainly in accord with the reasoning of the U.S. Supreme Court on the subject of child support. See *Kulko v. Superior Court*, 436 U.S. 84, 89 (1978) (court did not have jurisdiction when mother and child resided in state, but father did not); cf. *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983) (declared unconstitutional statute that precluded party from bringing suit without providing any alternative).

62. 683 S.W.2d at 559.

in coming to this conclusion: first, the father had earned more than \$1,325,000 since 1981; second, although it was unlikely that he would continue to earn this much, he had a contract that provided for payments to him of a minimum of \$80,000 per year for ten years beginning in 1986; third, the court considered that at the time of the decision the child was five years old and had not received one penny of support from the father.⁶³

Several other illegitimate children were not as fortunate as J.M.R.'s child since their fathers died before the filing of paternity actions. In *Reed v. Campbell*⁶⁴ the child attempted to establish the right to share in her father's estate by proving that she was legitimate either because of an informal marriage or because her father had "recognized" her. The jury did not find that an informal marriage existed, although it did find parentage.⁶⁵ The trial court did not submit the hotly disputed recognition issue to the jury. The appellate court upheld the judgment on the theory that the trial court had made an implied finding that the father had not recognized the child.⁶⁶ In 1976, the year of the alleged father's death, Texas law made no provision for illegitimate children to inherit from their fathers by intestacy, although legitimate children could.⁶⁷ In dictum the court stated that the only way any illegitimate child may inherit is if the father has complied with the 1979 statute,⁶⁸ a clear impossibility in this case.⁶⁹

A federal court in a social security case held contrary to the decision in *Reed*. In *Pena v. Heckler*⁷⁰ the court found that the child was the product of an extramarital liaison between the mother and father that took place during the mother's marriage to another man.⁷¹ Although the father died in 1968, when Texas did not permit illegitimate children to inherit from their fathers,⁷² the court held that the child could receive the benefits.⁷³ The court noted that prior federal and state courts held section 42 of the Texas Probate Code unconstitutional.⁷⁴ The *Pena* court held, in accord with another Fifth Circuit decision,⁷⁵ that when the applicable state law unconstitutionally deprives a group of benefits, the court should extend the benefits to the deprived group.⁷⁶

The court in *In re Estate of Castaneda*⁷⁷ held that the children in question

63. *Id.*

64. 682 S.W.2d 697 (Tex. App.—El Paso 1984, writ ref'd n.r.e.), *cert. granted*, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

65. 682 S.W.2d at 699.

66. *Id.* at 699-700.

67. *Id.*; see Act of June 13, 1979, ch. 713, § 5, 1979 Tex. Gen. Laws 1740, 1743.

68. TEX. PROB. CODE ANN. § 42(b) (Vernon 1980).

69. 682 S.W.2d at 700.

70. 606 F. Supp. 958 (W.D. Tex. 1985).

71. *Id.* at 963.

72. See *supra* note 67 and accompanying text.

73. 606 F. Supp. at 963.

74. *Id.* at 960; see *Lovejoy v. Little*, 569 S.W.2d 501, 504 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

75. *Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982).

76. 606 F. Supp. at 960.

77. 687 S.W.2d 465 (Tex. App.—San Antonio 1985, no writ).

were not entitled to inherit, despite the fact that the father supported them and referred to them as his children.⁷⁸ The court held that adoption by estoppel was not applicable since no evidence of a contract to adopt the children existed.⁷⁹ The court also held that the children could inherit only if their father had complied with the current Probate Code.⁸⁰

In *Taylor v. Parr*⁸¹ a couple who chose to remain managing conservators rather than adopt a handicapped child⁸² could not recover in a wrongful death action.⁸³ The court first pointed out that there is no common law right to recover for wrongful death and that the Texas wrongful death statute limits recovery to the husband, wife, children, and parents of the deceased.⁸⁴ The term "parent" is limited to the mother, legitimate father, or adoptive parent.⁸⁵

After a divorce and a remarriage by the custodian wife, the wife often finds it convenient to allow the children of the first marriage to use the last name of the husband of the second marriage. In *Brown v. Carroll*⁸⁶ the first husband and legal father sought to enjoin his former wife permanently from permitting this practice. The trial court refused to enjoin the former wife, and the appellate court reversed, holding that a father had a protectable interest, and the courts wish to protect the child's relationship with his father.⁸⁷

In *State v. Corpus Christi People's Baptist Church, Inc.*⁸⁸ the Texas Supreme Court, in a strongly worded opinion, held that the state could regulate the safety and health standards of church-operated child care facilities.⁸⁹ The religious group contended that the licensing requirements of the state violated either the establishment of religion or the free exercise clauses of the United States Constitution.⁹⁰ The court held that the state's compelling interest in protecting children in child care facilities from physical and mental harm outweighed any burden the state licensing requirements placed on a religious organization.⁹¹

78. *Id.* at 466.

79. *Id.* at 466-67; see *Cavanaugh v. Davis*, 149 Tex. 573, 578-79, 235 S.W.2d 972, 973-74 (1951) (adoption by estoppel exists when parties agree to adoption but do not file an instrument of adoption); *Edwards v. Haynes*, 690 S.W.2d 50, 52 (Tex. App.—Houston [14th Dist.]) (parties must present evidence of agreement to adopt to prove adoption by estoppel), *rev'd*, 698 S.W.2d 97, 98 (Tex. 1985).

80. 687 S.W.2d at 465, 466; see TEX. PROB. CODE ANN. § 42(b) (Vernon 1980).

81. 678 S.W.2d 527 (Tex. App.—Houston [14th Dist.] 1984, no writ).

82. The child would no longer have been eligible for federal medicaid benefits had he been adopted. *Id.* at 529.

83. *Id.*

84. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1940).

85. 678 S.W.2d at 529; see TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1940).

86. 683 S.W.2d 61 (Tex. App.—Tyler 1984, no writ).

87. *Id.* at 63.

88. 683 S.W.2d 692 (Tex.), *appeal dismissed lack of substantial federal question sub. nom.* *Corpus Christi People's Baptist Church, Inc. v. Texas*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985).

89. *Id.* at 696-97; see TEX. HUM. RES. CODE ANN. §§ 42.001-.042 (Vernon 1980) (regulations for child care facilities).

90. 683 S.W.2d at 694-95; see U.S. CONST. amend. I.

91. 683 S.W.2d at 697.

When a child's parents move from one school district to another during the course of the child's education, school districts in Texas have discretion to determine whether the child may continue at the first school as a tuition-free student.⁹² In *Daniels v. Morris*⁹³ the court held that the school district could institute the policy that a child who changes his residence may finish the school year in his former school district only if his parents pay tuition.⁹⁴ The *Daniels* court determined that this policy did not violate the Texas Education Code⁹⁵ or the child's right to due process.⁹⁶

The Texas Supreme Court in *Spring Branch Independent School District v. Stamos*⁹⁷ unanimously upheld the legislature's attempt to improve public education with the institution of a rule that requires students to maintain a 70 average in all classes in order to participate in extracurricular activities.⁹⁸ The court held that students do not have a constitutionally protected interest in participation in extracurricular activities.⁹⁹ Other courts have also held that the right to participate in extracurricular school activities is not a constitutionally protected one.¹⁰⁰ In addition, an appellate court in Texas held that the right to play varsity as well as club soccer was not a fundamental right under the due process clause.¹⁰¹ Although the federal appellate courts have generally concurred with the Texas Supreme Court's view that the right to participate in extracurricular activities is not a fundamental right,¹⁰² they have also determined that it is not a constitutionally protected right and have, therefore, ruled that these controversies are not federal matters, but matters for the state courts.¹⁰³ The state courts have frustrated efforts of the University Interscholastic League (UIL) to enforce its rules by requiring that it file security for costs when appealing injunctions staying its decisions as to the eligibility of specific players.¹⁰⁴ Thus, the UIL is without enforcement power since the federal courts are closed to it¹⁰⁵ and the state courts are too expensive.¹⁰⁶

The attorney general has rendered an opinion that clergymen must report

92. TEX. EDUC. CODE ANN. § 23.26 (Vernon 1972).

93. 746 F.2d 271 (5th Cir. 1984).

94. *Id.* at 277.

95. *Id.*; see TEX. EDUC. CODE ANN. § 21.26 (Vernon 1972).

96. 746 F.2d at 277; see U.S. CONST. amend. XIV, § 1.

97. 695 S.W.2d 556 (Tex. 1985).

98. *Id.* at 558; see TEX. EDUC. CODE ANN. § 21.920(b) (Vernon Supp. 1985).

99. 695 S.W.2d at 561.

100. See *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1234-35 (5th Cir. 1985); *Niles v. University Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983).

101. *University Interscholastic League v. North Dallas Chamber of Commerce Soccer Ass'n*, 693 S.W.2d 513, 518 (Tex. App.—Dallas 1985, no writ).

102. See *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1234-35 (5th Cir. 1985); *Niles v. University Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983).

103. See *Maroney v. University Interscholastic League*, 764 F.2d 403, 406 (5th Cir. 1985); *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1234-35 (5th Cir. 1985) (constitutional commands ought not to be "trivialized").

104. *University Interscholastic League v. Maroney*, 681 S.W.2d 285, 285 (Tex. App.—Austin 1984, no writ); *University Interscholastic League v. Payne*, 635 S.W.2d 754, 756-57 (Tex. App.—Amarillo 1982, writ dismissed).

105. See *supra* note 103.

106. See *supra* note 104.

incidents of child abuse.¹⁰⁷ The attorney general interpreted the Family Code section that deals with reporting child abuse¹⁰⁸ as permitting no exceptions and, therefore, the clergyman-penitent exception¹⁰⁹ does not protect the clergyman from testifying in a trial of an abuse case.¹¹⁰ The attorney general opined that imposing the duty to report upon clergy did not violate the free exercise clause of the United States Constitution since the state's interest is compelling and does not unduly burden those who must report abuse.¹¹¹

In another opinion the attorney general held that when a divorced person under eighteen applies for a marriage license the clerk may not issue the license without parental or court consent.¹¹² Although section 4.03 of the Family Code states that one who is married may act in the capacity of an adult,¹¹³ the attorney general held that the more specific language in section 1.51¹¹⁴ of the Code was applicable.¹¹⁵ The opinion noted that under common law, which Texas has not rejected, marriage does not terminate "infancy" under all circumstances.¹¹⁶

III. CONSERVATORSHIP

Parents have the right to represent their children in legal actions¹¹⁷ and courts should not appoint a guardian ad litem unless the parent has an interest adverse to the minor.¹¹⁸ The right to represent one's children continues once it attaches,¹¹⁹ and a subsequent divorce and appointment of the other spouse as managing conservator while the suit is pending does not remove the possessory conservator as the original next friend.¹²⁰ If a party files suit after the divorce, however, the possessory conservator may not act as next friend unless a special agreement exists.¹²¹ Parents do not have a constitutional privilege that allows them not to testify against their child in a criminal trial,¹²² and the failure of Texas to provide for such a privilege is not

107. Op. Tex. Att'y Gen. No. JM-342 (1985).

108. TEX. FAM. CODE ANN. § 34.04 (Vernon 1975).

109. UNIF. R. EVID. 505.

110. Op. Tex. Att'y Gen. No. JM-342 (1985).

111. *Id.*; see U.S. CONST. amend. I.

112. Op. Tex. Att'y Gen. No. JM-359 (1985); TEX. FAM. CODE ANN. §§ 1.52, .53 (Vernon 1975).

113. TEX. FAM. CODE ANN. § 4.03 (Vernon 1975).

114. *Id.* § 1.51.

115. Op. Tex. Att'y Gen. No. JM-359 (1985).

116. *Id.*

117. TEX. FAM. CODE ANN. § 12.04(7) (Vernon Pam. Supp. 1986).

118. See *Leigh v. Bishop*, 678 S.W.2d 572, 573 (Tex. App.—Houston [14th Dist.] 1984, no writ).

119. *Urbish v. 127th Judicial Dist. Court*, 29 Tex. Sup. Ct. J. 202 (Feb. 15, 1986) (writ of mandamus denied because not in best interest of child to change next friends and attorneys two years after suit has been filed); *Urbish v. James*, 688 S.W.2d 230, 232 (Tex. App.—Houston [14th Dist.] 1985, no writ).

120. 688 S.W.2d at 234-35.

121. TEX. FAM. CODE ANN. § 14.04 (Vernon Pam. Supp. 1986).

122. *Port v. Heard*, 764 F.2d 423, 430-32 (5th Cir. 1985).

considered a denial of equal protection.¹²³

In *Stubbs v. Stubbs*¹²⁴ the Texas Supreme Court affirmed that the court must make a record of any proceeding concerning the parent-child relationship, unless the parties expressly waive the requirement.¹²⁵ The wife in this case was able to obtain review by means of a writ of error despite the fact that she signed an agreement incident to divorce.¹²⁶ When a spouse changes his mind after filing for divorce and requests a nonsuit, if the opposing party has not requested affirmative relief the court must grant the nonsuit as a ministerial act.¹²⁷ An appellate court will reverse the determination of conservatorship when an attorney in final argument to the jury makes a prejudicial appeal regarding the losing spouse's religion.¹²⁸ Grandparents have standing to intervene after a suit for divorce has been filed¹²⁹ and may be appointed managing conservators if the court finds that it is in the best interest of the child.¹³⁰

*Cooper v. Texas Department of Human Resources*¹³¹ is a troubling case. The father filed for divorce and appointment as managing conservator of the couple's four children. After a rather complete review, including reports from various social workers, the trial court appointed the Department of Human Resources (DHR) as managing conservator. The appellate court reversed, holding that the DHR had not discharged its burden of showing that the appointment of the natural parent as managing conservator was not in the best interest of the children and that the appointment of the DHR was in the children's best interest.¹³² The opinion is troubling because it details, while seeming to overlook, many instances of "discipline" that might be termed child abuse both on the part of the father and the grandparents.¹³³ Since the court placed the children primarily in the care of the grandparents, who first set the standard for discipline by harshly disciplining the father, who in turn harshly disciplined the children, one can easily predict that these children will themselves become abusive parents.¹³⁴ The problem was that DHR did not put its plan for the children in a favorable light.¹³⁵ The dissent noted his concern over the reports from the social workers that the father and grandmother did not consider their severe standards of punishment abusive.¹³⁶

123. *Id.*

124. 685 S.W.2d 643 (Tex. 1985).

125. *Id.* at 645; see TEX. FAM. CODE ANN. § 11.14(d) (Vernon Pam. Supp. 1986).

126. 685 S.W.2d at 646.

127. *Benavides v. Garcia*, 687 S.W.2d 397, 398 (Tex. App.—San Antonio 1985, no writ).

128. *In re Marriage of Knighton*, 685 S.W.2d 719, 722 (Tex. App.—Amarillo 1984, no writ).

129. TEX. R. CIV. P. 60.

130. *Young v. Young*, 693 S.W.2d 696 (Tex. App.—Houston [14th Dist.] 1985, writ *dism'd*).

131. 691 S.W.2d 807 (Tex. App.—Austin 1985, writ *ref'd n.r.e.*).

132. *Id.* at 813.

133. See *id.* at 810, 812.

134. For a discussion of the problems created by condoning abuse, see Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 FAM. L.Q. 1, 11-14 (1985).

135. 691 S.W.2d at 812-13.

136. *Id.* at 813-15 (Brady, J., dissenting).

Once the court has appointed a managing conservator, a suit to modify or change the appointed managing conservator places a heavy burden on the proponent of the change. In order to modify a custody order a court must find: (1) a material and substantial change in circumstances; (2) that retention of the present managing conservator would be injurious to the child; and (3) that appointment of a new managing conservator would be a positive improvement for the child.¹³⁷ Often this burden is extremely difficult to overcome.¹³⁸ Although an appellate court will reverse a trial court that has ordered a change in conservatorship when the trial court does not adhere to the standard,¹³⁹ if a genuine change occurs, such as an informal change in the custodians,¹⁴⁰ or a joint conservatorship that is unworkable,¹⁴¹ the appellate court will affirm. When only some evidence exists that a change in managing conservator might be in the best interest of the child, the trial court should hear all of the evidence, or the appellate court will reverse and remand.¹⁴²

In order for a party to bring a motion to modify within a year after a custody decision, the proponent of the change must attach an affidavit indicating that the child's present environment may endanger his physical health or significantly impair his emotional development.¹⁴³ In *Mobley v. Mobley*¹⁴⁴ the parents divided custody of the two children, with the mother having custody of the young daughter and the father of the son. The decree provided ample visitation rights so that the siblings could continue to see each other. Shortly after the entry of the divorce decree the father received military orders for a three-year assignment in Panama. Since this assignment was a future event, the trial court did not find current endangerment

137. TEX. FAM. CODE ANN. § 14.08(c)(1)(A)-(C) (Vernon Pam. Supp. 1986); *Jones v. Cable*, 626 S.W.2d 734, 736 (Tex. 1981). A court may also modify a decree if the managing conservator has voluntarily relinquished possession and control of the child for over one year and the change is in the best interest of the child. TEX. FAM. CODE ANN. § 14.08(c)(1)(D) (Vernon Pam. Supp. 1986).

138. See *Belford v. Belford*, 682 S.W.2d 675, 676-77 (Tex. App.—Austin 1984, no writ) (court refused to modify decree since no evidence of lack of moral integrity existed).

139. See *Villarreal v. Villarreal*, 684 S.W.2d 214, 219-20 (Tex. App.—Corpus Christi 1984, no writ) (speculation that father might move out of state not a change in circumstance); *Ramos v. Ramos*, 683 S.W.2d 84, 86 (Tex. App.—San Antonio 1984, no writ) (denial of father's visitation rights was insufficient change in circumstance).

140. See *Baker v. Ericsson*, 689 S.W.2d 492, 494 (Tex. App.—El Paso 1985, no writ) (child had lived with stepgrandmother for six years, but since stepgrandmother had not been permitted to intervene, case was remanded to determine whether father or stepgrandmother would best serve interests of child); see also *Snider v. Grey*, 688 S.W.2d 602, 610-11 (Tex. App.—Corpus Christi 1985, no writ) (father's lies and strange rituals, and mother's new marriage, as well as split custody agreement in original decree that became unworkable as child grew older, demonstrated substantial change in circumstance).

141. *Billeaud v. Billeaud*, 697 S.W.2d 652 (Tex. App.—Houston [1st Dist.] 1985, no writ) (father had moved from state so settlement agreement providing that both parties be managing conservators was no longer applicable).

142. *R.W.M. v. J.C.M.*, 684 S.W.2d 746, 749-50 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). The dissent points out that the remand in a bench trial is unlikely to change the result because the judge will have already decided whether he should include the evidence. *Id.* at 753 (Gonzalez, J., dissenting).

143. TEX. FAM. CODE ANN. § 14.08(d) (Vernon Pam. Supp. 1986).

144. 684 S.W.2d 226 (Tex. App.—Fort Worth 1985, writ dismissed).

under the three-part test and dismissed for failure to state a claim.¹⁴⁵ The appellate court decided this reading of the statute to be too literal and reversed and remanded.¹⁴⁶ The appellate court held that only the threshold test of whether a child may possibly be harmed is required when determining if an affidavit states facts sufficient to require a hearing on the motion to modify.¹⁴⁷ If the affidavit states facts sufficient for a hearing on the motion to modify, the mother must still meet the three-part test for a change of conservatorship.¹⁴⁸

Since a default judgment that changes the possession of the children may not produce sufficient evidence to indicate that the change is in the children's best interest, under a motion to modify possession an appellate court will review the evidence to protect the children, and will reverse and remand if the court is not satisfied.¹⁴⁹ A jury trial may be granted as a matter of right, even if the only relief requested is a modification of access to the child, since the question of a change in circumstance, the threshold question, is one for the jury.¹⁵⁰ In *A.K.P. v. J.A.P.*¹⁵¹ the court held that a less substantial change in circumstance is necessary when the modification concerns access or visitation rather than custody.¹⁵² The court held that a prior order should be modified if it is no longer manageable or appropriate.¹⁵³ The original decree ordered specific visitation times for the father, and also provided for additional visitation upon the agreement of the parties. Upon discovering that the father and his new wife had contracted herpes, the wife limited the child's visits to the times specified in the decree. The appellate court held that the contraction of herpes was a change of circumstance, but that the wife's actions made the prior decree unworkable, and it was not an abuse of discretion to grant the father further visitation rights.¹⁵⁴

Once the court has decided questions of custody and visitation, the parties may have trouble enforcing the decree. Managing conservators have on several occasions used the mandamus power of the courts of civil appeals for this purpose,¹⁵⁵ especially when the managing conservator has asked for a writ of habeas corpus and the trial court has chosen to hold a hearing on the

145. *Id.* at 228; see *supra* note 137 and accompanying text.

146. 684 S.W.2d at 230.

147. *Id.*

148. *Id.*

149. See *Davis v. Ross*, 678 S.W.2d 636, 638-39 (Tex. App.—Houston [14th Dist.] 1984, no writ).

150. *Sullivan v. Sullivan*, 691 S.W.2d 9, 10-11 (Tex. App.—Houston [14th Dist.] 1985, no writ) (any party may demand jury trial in motion to modify child access or possession rights); see also *Phillips v. Phillips*, 29 Tex. Sup. Ct. J. 97, 97 (Dec. 14, 1985) (parties have right to jury trial if issue is modification of child support).

151. 684 S.W.2d 762 (Tex. App.—Corpus Christi 1984, no writ).

152. *Id.* at 765.

153. *Id.*

154. *Id.*

155. TEX. REV. CIV. STAT. ANN. art. 1824 (Vernon 1964), *repealed by* Act of June 13, 1985, ch. 480, § 26, 1985 Tex. Sess. Law Serv. 3363, 4086 (Vernon), was amended in 1983 to grant the courts of civil appeals the power to issue writs of mandamus in proper cases. Act of June 19, 1983, ch. 839, § 3, 1983 Tex. Gen. Laws 4767, 4768-69.

merits.¹⁵⁶ Mandamus will issue even if the party resisting the writ has perfected an appeal from the judgment the opposing party seeks to enforce.¹⁵⁷ The courts will not issue a writ of mandamus if the order is not void, but merely voidable.¹⁵⁸ Mandamus will lie, however, when a trial court clearly abuses its discretion, such as by imposing a \$100,000 cost bond for an abuse of discovery.¹⁵⁹

A party may obtain a writ of mandamus, but not the desired relief. In *Jacobsen v. Jacobsen*¹⁶⁰ the trial court complied with the mandamus order, but issued an injunction that prevented the managing conservator mother from removing the children from the jurisdiction until the court could hear the matter.¹⁶¹ The trial court made no finding of serious immediate question, concerning the welfare of the children,¹⁶² and the appellate court affirmed, noting that the mother had left the children with their father for more than a year after the original decree and that the children had been attending school in Corpus Christi for more than two years.¹⁶³ Additionally, the court sustained a temporary injunction prohibiting the mother from proceeding with a Canadian case that she had filed, which related to the same subject matter, in order to protect the Texas court's jurisdiction.¹⁶⁴ The case is important because it may provide means to circumvent the onerous serious immediate question test.¹⁶⁵

Finding the proper jurisdiction is often a problem when attempting to

156. See, e.g., *McCaleb v. Hansard*, 697 S.W.2d 73, 75 (Tex. App.—El Paso 1985, no writ); *Black v. Onion*, 694 S.W.2d 52, 55 (Tex. App.—San Antonio 1985, no writ); *Jacobsen v. Haas*, 688 S.W.2d 634, 636 (Tex. App.—Corpus Christi 1985, no writ); *Young v. Martinez*, 685 S.W.2d 361, 363 (Tex. App.—San Antonio 1984, no writ); *Cowan v. Lindsey*, 683 S.W.2d 55, 57 (Tex. App.—Tyler 1984, no writ) (person with superior right of custody is entitled to mandamus without considering any pending modifications in prior custody decree); *Park v. Hopkins*, 677 S.W.2d 791, 791-92 (Tex. App.—Fort Worth 1984, no writ) (writ denied because original order complained of was not attached to petition).

157. *Martin v. O'Donnell*, 690 S.W.2d 75, 76 (Tex. App.—Dallas 1985, no writ).

158. *Wike v. Dagget*, 696 S.W.2d 79, 82 (Tex. App.—Houston [14th Dist.] 1985, no writ).

159. *Smith v. White*, 695 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1985, no writ).

160. 695 S.W.2d 44 (Tex. App.—Corpus Christi 1985, no writ).

161. *Id.* at 46-47.

162. See *infra* note 165.

163. 695 S.W.2d at 47.

164. *Id.* at 48.

165. Section 14.10(a) of the Family Code provides that the court should compel return of a child in a habeas corpus action if the court finds that the relator is presently entitled to possession by virtue of a court order. TEX. FAM. CODE ANN. § 14.10(a) (Vernon Pam. Supp. 1986). Subsection (b) requires the court to disregard any motion for modification except under limited circumstances. *Id.* § 14.10(b). Subsection (c) permits the trial court to enter a temporary order in a habeas corpus proceeding if a serious immediate question concerning the welfare of the child exists. *Id.* § 14.10(c). The Texas Supreme Court has interpreted the test as requiring a showing that the child is in immediate danger of physical or emotional harm and orders are necessary to protect the child. *McElreath v. Stewart*, 545 S.W.2d 955, 956-57 (Tex. 1977). In *Jacobsen* the father avoided this burden by requesting a temporary injunction in a hearing distinct from the habeas corpus action. The court of appeals accepted his argument that § 14.08(g) controlled over his action. 695 S.W.2d at 48; see TEX. FAM. CODE ANN. § 14.08(g) (Vernon Pam. Supp. 1986) (court may enter a temporary order that has the effect of changing the designation of a managing conservator only if a serious immediate question exists), managing conservator had established residence of children and trial court could temporarily maintain it for safety and welfare of children. 695 S.W.2d at 47.

modify a prior decree, and Texas courts are respectful of custody decrees rendered by courts of other states that are based on proper jurisdiction.¹⁶⁶ When Texas issues a divorce decree, but the managing conservator and the child have established a residence in a different state, the Texas court will have lost jurisdiction of custody matters unless the parties agree to the jurisdiction.¹⁶⁷ In *Soto-Ruphuy v. Yates*¹⁶⁸ the court conditionally issued a writ of mandamus when the possessory conservator, a Texas resident, filed a counterclaim for managing conservatorship to the managing conservator's action to increase child support.¹⁶⁹ The managing conservator, the mother, had resided in California with the child for six years. The child was in Texas only because the possessory conservator, his father, had refused to return him to California at the end of a one-month visitation period. The court determined that section 11.53(d)¹⁷⁰ prohibited the court from exercising jurisdiction over custody issues since the child's home state was California.¹⁷¹ In *Palmore v. Sidoti*¹⁷² the Florida court decided not to exercise jurisdiction, even though it probably had it,¹⁷³ because the child in question had been in Texas for more than two and one-half years and the court held that the evidence concerning her care was more accessible in Texas than in Florida.¹⁷⁴ Not all courts apply the law correctly. In *Houtchens v. Houtchens*¹⁷⁵ a Rhode Island court insisted it had jurisdiction although the children's home state was Texas and the father had brought the children to Rhode Island only a few weeks prior to his filing. The court relied on its version of the Uniform Child Custody Jurisdiction Act,¹⁷⁶ which grants jurisdiction if substantial evidence exists concerning the child in Rhode Island.¹⁷⁷ The court did not mention the Parental Kidnapping Prevention Act,¹⁷⁸ which would have controlled in this case.¹⁷⁹ This statute probably would have re-

166. See, e.g., *Lundell v. Clawson*, 697 S.W.2d 836, 841 (Tex. App.—Austin 1985, no writ) (would honor Minnesota custody decision unless a party showed that Minnesota had either lost or declined jurisdiction); *Irving v. Irving*, 682 S.W.2d 718, 721-22 (Tex. App.—Fort Worth 1985, no writ) (Illinois judgment entitled to full faith and credit because father had brought children to Texas only four days before filing suit); *Bolger v. Bolger*, 678 S.W.2d 194, 196 (Tex. App.—Corpus Christi 1984, no writ) (court dismissed petitioners' suit since New York court found that New York was children's home state).

167. TEX. FAM. CODE ANN. § 11.53(d) (Vernon Pam. Supp. 1986).

168. 687 S.W.2d 19 (Tex. App.—San Antonio 1984, no writ).

169. *Id.* at 20.

170. TEX. FAM. CODE ANN. § 11.53(d) (Vernon Pam. Supp. 1986).

171. 687 S.W.2d at 21.

172. 472 So. 2d 843 (Fla. Dist. Ct. App. 1985).

173. The Florida district court originally awarded custody to the father. The Florida district court of appeal affirmed. *Palmore v. Sidoti*, 426 So. 2d 34 (Fla. Dist. Ct. App. 1982), *rev'd*, 104 S. Ct. 1879, 1883, 80 L. Ed. 2d 421, 427 (1984).

174. 472 So. 2d at 845-46.

175. 488 A.2d 726 (R.I. 1985).

176. R.I. GEN. LAWS § 15-14-4(a)(2) (1956).

177. 488 A.2d at 730.

178. 28 U.S.C. § 1738A(c) (1982). The federal Parental Kidnapping Act is a federal mandate that requires all states to enforce and not to modify other states' child custody determinations that are consistent with the Act. *Williams v. Knott*, 690 S.W.2d 605, 608 (Tex. App.—Austin 1985, no writ).

179. The Parental Kidnapping Prevention Act provides that a court has jurisdiction if (1) the state is the home state of the child, or (2) it had been the home state within six months

quired Rhode Island to recognize the Texas court's jurisdiction, since Texas was the children's home state at the time of the father's filing in Rhode Island.¹⁸⁰ Impasses of this kind have occurred in other cases, and the litigants have turned to the federal appellate courts for a solution.¹⁸¹ In *Heartfield v. Heartfield*¹⁸² a federal appellate court, in a custody and child support case, held that the district court acted prematurely in issuing a preliminary injunction to enforce Texas's jurisdiction when the Louisiana court had not yet ruled.¹⁸³ It appears that in the Fifth Circuit claimants will have to exhaust their state court remedies fully before applying to the federal courts.

IV. SUPPORT

An appellate court will not overturn a trial court's judgment determining the amount of child support unless the appellate court finds a clear abuse of discretion.¹⁸⁴ Court-ordered child support is not necessarily "disguised alimony" if the order reduces the amount of support when the child starts school.¹⁸⁵ A court may not order a party to pay contractual alimony; thus, the court acted within its authority when it modified the settlement agreement to clarify that it was ordering child support and not spousal support.¹⁸⁶

A trial court may not summarily change a settlement agreement at an uncontested hearing.¹⁸⁷ Although the judge is not required to order an agreement that is not in the best interest of the child,¹⁸⁸ the court cannot change the agreement without affording the absent party an opportunity to be heard in accordance with due process.¹⁸⁹ A court cannot order a change in amount of support nunc pro tunc without notice to the party affected.¹⁹⁰

of the date the proceedings began and the child is absent because he was removed by a party to the suit. 28 U.S.C. § 1738A(c) (1982).

180. 488 A.2d at 730.

181. See, e.g., *Diruggiero v. Rodgers*, 743 F.2d 1009, 1015 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303, 308-13 (3d Cir. 1984); *McDougald v. Jenson*, 696 F. Supp. 680, 686 (N.D. Fla. 1984); *Templeton v. Witham*, 595 F. Supp. 770, 776-77 (S.D. Cal. 1984).

182. 749 F.2d 1138 (5th Cir. 1985).

183. *Id.* at 1143; see also *Siler v. Storey*, 587 F. Supp. 985, 987-88 (N.D. Tex. 1984) (federal court refused to issue writ of prohibition because Texas court had not yet ruled).

184. See *Welch v. Welch*, 694 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1985, no writ) (child support payments of \$1000 per month was abuse of discretion when obligor was using all available funds to pay creditors); *Schuster v. Schuster*, 690 S.W.2d 644, 645-46 (Tex. App.—Austin 1985, no writ) (\$400 per month for each child was not abuse of discretion despite obligor's argument that he had little job security).

185. See *Robinson v. Robinson*, 694 S.W.2d 569 (Tex. App.—Corpus Christi 1985, no writ). The court ordered the obligor to pay \$4000 per month until the child started school and then \$3000 per month thereafter. Since the obligor wanted the obligee to be at home with the child until the child was old enough to attend school, and the court found that the obligor had sufficient current income to pay support, the appellate court held that the support was not disguised alimony and the trial court had not abused its powers. *Id.* at 571-72.

186. *Klise v. Klise*, 678 S.W.2d 545, 547-48 (Tex. App.—Houston [14th Dist.] 1984, no writ) (court deleted words "her support" from sentence in which parties agreed that obligor would pay \$400 per month in support of obligee and minor children, holding that parties could provide for alimony only in a separate contract).

187. *K.D.B. v. C.B.B.*, 688 S.W.2d 684, 686 (Tex. App.—Tyler 1985, no writ).

188. *Id.*; see TEX. FAM. CODE ANN. § 14.06(b) (Vernon 1975).

189. *K.D.B. v. C.B.B.*, 688 S.W.2d at 687.

190. *White v. Culver*, 695 S.W.2d 763 (Tex. App.—El Paso 1985, no writ).

The San Antonio court of appeals held that an agreement not to ask for child support or an increase in child support that was incorporated within a judgment is unenforceable because it is against public policy.¹⁹¹

In order to modify any of the provisions of an order relating to the parent-child relationship, the proponent of the modification must show a change in circumstance.¹⁹² The proponent must therefore introduce evidence of the prior circumstance in order to demonstrate a change in circumstance.¹⁹³ When, however, the moving party proves a substantial increase in expenses or an increase in the salary of the obligor the appellate court will affirm an upward modification of support.¹⁹⁴ To order an upward modification that places too large a burden on the obligor, such as being personally liable for a million dollars in health care, however, is reversible error.¹⁹⁵ The supreme court recently held that a party to a modification action has a right to have a jury determine the threshold question of change of circumstance.¹⁹⁶

A disabled child may require support after he reaches age eighteen. The Family Code provides that courts may enforce orders for such support provided the court entered the orders before the child became eighteen.¹⁹⁷ In *Rose v. Rubenstein*¹⁹⁸ the court entered an order for support of the disabled child by the father at the time of divorce. When the child was twenty-four years old the father sought relief from his obligation, complaining that since the mother was under no such obligation it was violative of equal protection.¹⁹⁹ Although the court found that it could not now enter an order requiring financial support from the mother, it also held that no constitutional discrimination existed.²⁰⁰ The mother had and continued to give both financial and emotional support without being so ordered, while the father provided only court-ordered support.²⁰¹ The *Rose* court also defined "continuous care and personal supervision"²⁰² according to its ordinary and plain meaning. The court held that, although the child in question was able to live alone in an apartment, he still required a certain degree of formal supervision; thus, he came within the ambit of the statute.²⁰³

In *Rogers v. Stephens*²⁰⁴ the mother petitioned to extend previously ordered child support for three years past the child's eighteenth birthday. The

191. *Galaznik v. Galaznik*, 685 S.W.2d 379, 384 (Tex. App.—San Antonio 1985, no writ).

192. TEX. FAM. CODE ANN. § 14.08(c)(2) (Vernon Pam. Supp. 1986).

193. *Liveris v. Ross*, 690 S.W.2d 60, 61 (Tex. App.—Houston [14th Dist.] 1985, no writ).

194. See *Arndt v. Arndt*, 685 S.W.2d 769, 770 (Tex. App.—Houston [1st Dist.] 1985, no writ) (father ordered to increase support of two children from \$130 to \$220 per month).

195. *Bacon v. Kouri*, 696 S.W.2d 599, 601-02 (Tex. App.—Houston [14th Dist.] 1985, no writ).

196. *Phillips v. Phillips*, 29 Tex. Sup. Ct. J. 97, 97 (Dec. 14, 1986).

197. TEX. FAM. CODE ANN. § 14.05(b) (Vernon Pam. Supp. 1986).

198. 693 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1985, writ dismissed).

199. See U.S. CONST. amend. XIV, § 1.

200. 693 S.W.2d at 583.

201. *Id.* at 583-84 (mother is in daily contact with child, while father has neither seen nor spoken to child in eight years).

202. TEX. FAM. CODE ANN. § 14.05(b) (Vernon Pam. Supp. 1986).

203. 693 S.W.2d at 582-83.

204. 697 S.W.2d 75 (Tex. App.—Fort Worth 1985, writ dismissed).

child had had difficulty learning to read and his mother believed that extra time in a special school would enable him to become self-supporting. The court strongly disagreed with the father's contention that improved reading ability would not aid the child and upheld the trial court's order to extend the support.²⁰⁵

Enforcement of support orders has proven to be difficult. The solution to this problem, the new involuntary wage assignment statute,²⁰⁶ has not been in place long enough to evaluate its effect.²⁰⁷ It is clear, however, that the courts may only use the statute to collect arrearage judgments before the child has reached eighteen, while the court that issued the decree still has jurisdiction.²⁰⁸ In determining arrearages the court may consider informal changes in the possession arrangements for a child, such as if the child lives with the obligor for longer periods of time than originally stipulated in the decree.²⁰⁹ Since reducing child support arrearages to a money judgment does not involve the possibility of loss of liberty, as does an action for contempt, the court in *Crawford v. Gardner*²¹⁰ held that the constitutional protections that are necessary in a contempt proceeding are not required in a suit to reduce arrearages to a money judgment.²¹¹ The statute of limitations is ten years on such arrearages.²¹² The failure by the obligee to list a claim for child support in a bankruptcy action will not extinguish the obligee's claim.²¹³ When an obligor transforms his retirement benefits into disability benefits, these benefits become garnishable for child support obligations to the extent they represent the waived retirement pay.²¹⁴

In *Welker v. Welker*²¹⁵ the ex-wife and children brought an action to enforce a property settlement agreement obligating the ex-husband to maintain the ex-wife and children as beneficiaries of an insurance policy. The ex-wife and the decedent's estate argued as to whether the agreement stipulated that the ex-husband was to maintain a policy worth not less than \$5,000, or whether the ex-wife and children were only to receive \$5,000 from the policy. The appellate court held that it could not enforce the agreement since the terms were not specific enough, and reversed and remanded the case to the trial court to determine the meaning of the agreement.²¹⁶ The appellate court held that the ex-wife and children had an equitable interest in the pro-

205. *Id.* at 79.

206. *See supra* notes 20-21 and accompanying text.

207. The legislature enacted the statute in 1985. *See* TEX. FAM. CODE ANN. § 14.05 (Vernon Pam. Supp. 1986).

208. *In re Brecheisen*, 694 S.W.2d 438, 440 (Tex. App.—Dallas 1985, no writ).

209. *Shannon v. Fowler*, 693 S.W.2d 54, 57 (Tex. App.—Fort Worth 1985, writ dismissed) (court could reduce arrearages for time child spent with obligor).

210. 690 S.W.2d 296 (Tex. App.—Dallas 1985, no writ).

211. *Id.* at 297.

212. *Shannon v. Fowler*, 693 S.W.2d 54, 56 (Tex. App.—Fort Worth 1985, no writ); *see* TEX. FAM. CODE ANN. § 14.41(b) (Vernon Pam. Supp. 1986).

213. *Shannon*, 693 S.W.2d at 57.

214. *Veterans' Admin. v. Kee*, 692 S.W.2d 181, 185 (Tex. App.—Amarillo 1985, writ granted).

215. 683 S.W.2d 211 (Tex. App.—Fort Worth 1985, no writ).

216. *Id.* at 213.

ceeds, and that only the amount was in doubt.²¹⁷

The Texas Court of Criminal Appeals in *Lowry v. State*²¹⁸ held a portion of the criminal nonsupport sections of the criminal code unconstitutional.²¹⁹ The problem was that the statute as written shifted the burden of proving that the defendant could not pay the support he was obligated by law to pay from the state to the defendant.²²⁰ Since shifting the burden of proof to the defendant is a violation of due process,²²¹ the court declared ineffective and severed that portion of the statute that was offensive and remanded for a new trial.²²²

A party may not appeal a contempt order since it is not a final judgment.²²³ The primary means of relief from a finding of contempt is a habeas corpus action. A court will not issue the writ when the order is clear.²²⁴ If the court order is not clear, but the contemnor agrees to a judgment of contempt, then the party waives his right to complain about the order's ambiguity.²²⁵ If a party stipulates to the arrearage and admits that he is in contempt of a court order, his action is prima facie proof of contempt.²²⁶ The fact that the court orders the contemnor to answer questions as to his name, employment, and office location over his fifth amendment objections is not against the contemnor's fifth amendment rights.²²⁷ When the punishment in a contempt case is for less than six months a jury trial is not required.²²⁸ If no prior underlying order exists, a contempt order cannot stand,²²⁹ nor can it be based on superseded prior support orders.²³⁰ A court cannot order confinement for thirty days for contempt, and then increase the sentence to 180 days without holding an additional hearing.²³¹ Even if someone has been adjudged in contempt and put on probation and violates the terms of the probation, he should not be confined for more than seventy-two hours without a hearing.²³²

217. *Id.*

218. 692 S.W.2d 86 (Tex. Crim. App. 1986).

219. *Id.* at 87-88; see TEX. CRIM. CODE ANN. § 25.05(f) (Vernon 1974).

220. 692 S.W.2d at 86.

221. *Mullaney v. Wilber*, 421 U.S. 684, 698-701 (1975).

222. 692 S.W.2d at 87-88.

223. *Norman v. Norman*, 692 S.W.2d 655, 655 (Tex. 1985).

224. See, e.g., *Ex parte Johnson*, 692 S.W.2d 599, 600 (Tex. App.—Fort Worth 1985, no writ); *Ex parte Laymon*, 679 S.W.2d 532, 534 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Ex parte Snow*, 677 S.W.2d 147, 149 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Howard v. Texas Dep't Human Resources*, 677 S.W.2d 667, 668 (Tex. App.—Dallas 1984, no writ).

225. *Ex parte Crawford*, 684 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1984, no writ).

226. *Ex parte Burroughs*, 687 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1985, no writ).

227. *Id.*

228. *Ex parte Papageorgiou*, 685 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1985, no writ).

229. *Ex parte Franklin*, 683 S.W.2d 33, 34 (Tex. App.—Tyler 1984, no writ).

230. *Ex parte Smith*, 691 S.W.2d 101 (Tex. App.—Dallas 1985, no writ).

231. *Ex parte McNulty*, 678 S.W.2d 745, 747 (Tex. App.—Houston [14th Dist.] 1984, no writ).

232. *Ex parte Seymour*, 688 S.W.2d 139, 140-41 (Tex. App.—Beaumont 1985, no writ) (probationer was confined seven days without being brought before court; court held this action to be illegal); see TEX. FAM. CODE ANN. § 14.40(c)(6) (Vernon Pam. Supp. 1986).

Enforcing foreign support orders can be a problem. If an order is not properly authenticated, the courts may not use it as a basis for a judgment to give the foreign order full faith and credit.²³³ In *Heissner v. Koons*,²³⁴ a case involving the Uniform Reciprocal Enforcement of Support Act,²³⁵ the foreign obligee agreed to answer more than thirty interrogatories in a proceeding to enforce a foreign child support order. The district attorney moved to require the obligor to answer the same number and he objected. The trial court denied the relief, and the obligor petitioned for a writ of mandamus. The court held that the Texas Rules of Civil Procedure prohibit enlargement of the number of answers required without a showing that justice requires enlargement.²³⁶

V. TERMINATION AND ADOPTION

Current statutes provide that, if an obligor fails to pay child support in accordance with his ability for a year that ends within six months of the filing of the petition to terminate parental rights,²³⁷ and the court finds that termination is in the best interest of the child,²³⁸ a court may terminate the parent-child relationship. The evidentiary standard for termination is that the evidence must be clear and convincing.²³⁹ The standard applies equally to both grounds,²⁴⁰ but too many trial courts are basing their judgments for termination only on clear and convincing evidence of failure to support, thus requiring appellate courts when the judgment is appealed to reverse and render.²⁴¹ The legislature may have to decide whether child support and access to the child should be so closely related.

In *Williams v. Knott*²⁴² Oklahoma rendered the divorce and original custody decree. The mother remarried, moved to Texas, and filed for termination and adoption in a Texas court. The father argued that since the original custody determination in Oklahoma was consistent with the federal Parental Kidnapping Prevention Act,²⁴³ Oklahoma had continuing jurisdiction. The appellate court correctly distinguished between custody and termination suits; thus it held that the Act did not apply to a termination suit.²⁴⁴ The

233. *Starzl v. Starzl*, 686 S.W.2d 203, 205-06 (Tex. App.—Dallas 1984, no writ).

234. 679 S.W.2d 112 (Tex. App.—Dallas 1984, no writ).

235. *Id.* at 113-14; see TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon Pam. Supp. 1986).

236. 679 S.W.2d at 114-15; see TEX. R. CIV. P. 168(5).

237. TEX. FAM. CODE ANN. § 15.02(F) (Vernon Pam. Supp. 1986).

238. *Id.* § 15.01 (Vernon 1975).

239. *Id.* § 11.15(b) (Vernon Pam. Supp. 1986); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980).

240. *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976).

241. See, e.g., *Williams v. Knott*, 690 S.W.2d 605, 610 (Tex. App.—Austin 1985, no writ); *Williams v. Gaul*, 687 S.W.2d 85, 88 (Tex. App.—Waco 1985, no writ); *Turner v. Lutz*, 685 S.W.2d 356, 359-60 (Tex. App.—Austin 1985, no writ) (failure of court-appointed guardian ad litem to testify regarding best interest of the children indicated insufficient evidence on this point); *Alexander v. Russell*, 682 S.W.2d 370, 374 (Tex. App.—El Paso 1984) (father found to have failed to support in accordance with ability), *rev'd per curiam on other grounds*, 699 S.W.2d 209, 210-11 (Tex. 1985).

242. 690 S.W.2d 605 (Tex. App.—Austin 1985, no writ).

243. 28 U.S.C. § 1738A (1982).

244. 690 S.W.2d at 608; see 28 U.S.C. § 1738A (1982).

Williams court failed to understand the importance of parental rights²⁴⁵ and decided that since the question was not one of status, the court did not require personal jurisdiction over the appellant.²⁴⁶

In *Holick v. Smith*²⁴⁷ the Texas Supreme Court held that courts should strictly scrutinize proceedings concerning termination of parental rights.²⁴⁸ In *Holick* an indigent mother provided for the care of her children by placing them with a caring family for over six months. The court held that the mother's action did not amount to failure to provide adequate support in view of the arrangements she had made for the children's support.²⁴⁹

Jurisdiction as between a probate court and a district court can cause confusion. In *Cruz v. Scanlan*²⁵⁰ a stepfather, shortly after the children's natural mother had died, filed a motion for termination and adoption in the district court. When the probate court appointed the children's aunt as temporary guardian, the stepfather filed for a writ of mandamus directing the probate court to vacate its order. The court granted the writ on the basis that once a court has jurisdiction of a suit involving the parent-child relationship, no other court may also maintain jurisdiction.²⁵¹ This rule applies to cases of guardianship, since guardianship is the same as a managing conservatorship.²⁵²

*Grimes v. Harris*²⁵³ upheld the jurisdiction of the court that first acquired jurisdiction of the custody issue, rather than the court that first had jurisdiction over the parties.²⁵⁴ In *Grimes* a divorce petition filed in Dallas County did not mention the fact that the wife was pregnant. According to later reports the biological father was not the husband. Before either the birth of the baby or the rendering of the divorce decree the prospective adoptive parents filed a petition in Collin County to terminate the parent-child relationship. After the birth of the baby the husband and wife signed affidavits of relinquishment, the alleged father signed a waiver of interest, and the Collin County court granted the potential adoptive parents temporary managing conservatorship. At the termination hearing the wife and biological father attempted to withdraw the relinquishments and the Collin County court took the matter of termination under advisement. Meanwhile, the wife and husband went back to the Dallas court, and without mentioning the Collin

245. See *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (father's consent to adoption of his illegitimate child is necessary); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976) (courts must strictly scrutinize action to terminate parental rights of mother); *Wiley v. Spratlan*, 543 S.W.2d 349, 353 (Tex. 1976) (natural right between parents and children cannot be severed unless substantial reasons exist).

246. 690 S.W.2d at 607. *But see* *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

247. 685 S.W.2d 18 (Tex. 1985).

248. *Id.* at 20 (involuntary termination statutes are to be strictly construed in favor of the parent).

249. *Id.* at 21 (interpreting TEX. FAM. CODE ANN. § 15.02(1)(C) (Vernon Pam. Supp. 1986)).

250. 682 S.W.2d 422 (Tex. App.—Houston [1st Dist.] 1984, no writ).

251. *Id.* at 423.

252. *Id.*

253. 695 S.W.2d 648 (Tex. App.—Dallas 1985, no writ).

254. *Id.* at 652.

County proceedings, amended the divorce petition to include a child of the marriage. The Dallas court granted the divorce and awarded managing conservatorship to the wife. The potential adoptive parents filed for a writ of mandamus in the Dallas court to dismiss the infant from the Dallas court's divorce jurisdiction. The Dallas court granted the writ, holding that although the court would normally have dominant jurisdiction, the court would grant the writ because of the dishonest behavior of the various contestants.²⁵⁵ The problem with this decision is that no court ever made a finding of paternity. A court should have established the fact that the child was not a true child of the marriage, if such were the case. The place to establish this fact would appear to be in the divorce court so that if the child is legitimate the court may enter proper orders for its custody and support.

Nonagency adoptions can be troublesome if the relinquishing parent changes her mind. In *Martin v. Mooney*²⁵⁶ the relinquishing mother contended that her relinquishment was void because the attorney who took her affidavit had a conflict of interest. The attorney withdrew immediately from the case upon learning of the problem, and the court held that the relinquishment was not void because the attorney had no financial interest in the case and was merely performing a ministerial act.²⁵⁷

Even agency adoptions can run into trouble when procedures are not followed with care. In *Cochrane v. Homes of St. Mark*²⁵⁸ the jury found that the Homes of St. Mark had obtained an affidavit of relinquishment by duress and undue influence.²⁵⁹ Despite the fact that the mother won in this case, the court assessed part of the ad litem fees for the child against her. The appellate court held that this assessment was not an abuse of discretion.²⁶⁰ In all other cases during the Survey year in which an agency sought to terminate parental rights the agencies were sustained because the agencies had established the fact of both proscribed conduct and the best interest of the child by clear and convincing evidence.²⁶¹

*In re Unnamed Baby McLean*²⁶² is a case that raises the unresolved problem of the distinction between a mother who is by law the equivalent of a parent,²⁶³ and a father who is not a parent because the child was born out of

255. *Id.* at 651.

256. 695 S.W.2d 211 (Tex. App.—Austin 1985, no writ).

257. *Id.* at 213.

258. 687 S.W.2d 394 (Tex. App.—Houston [14th Dist.] 1985, no writ).

259. *Id.* at 395; *see also* B.A.L. v. Edna Gladney Home, 677 S.W.2d 826, 829 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (court terminated mother's rights since it found no undue influence, pressure, or overreaching).

260. 687 S.W.2d at 396.

261. *See, e.g.,* Ziegler v. Tarrant County Child Welfare Unit, 680 S.W.2d 674, 676 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (finding of abuse of one child sufficient to terminate rights to all five children); Baxter v. Texas Dep't of Human Resources, 678 S.W.2d 265, 267-68 (Tex. App.—Austin 1984, no writ) (evidence of sexually explicit materials in the home as well as evidence of abuse sufficient to terminate rights); Stuart v. Tarrant County Child Welfare Unit, 677 S.W.2d 273, 281-82 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (parents placing child in dangerous surroundings and causing child's failure to attend school held sufficient to terminate parental rights).

262. 697 S.W.2d 479 (Tex. App.—Fort Worth 1985, no writ).

263. TEX. FAM. CODE ANN. § 12.01 (Vernon 1975).

wedlock.²⁶⁴ The mother can consent to the illegitimate child's adoption,²⁶⁵ but the father has no say unless the courts have adjudged him fit to become a parent.²⁶⁶ In *McLean* the father was a married man who was raising three sons with no problems when he became involved in a brief indiscretion that resulted in the child who was the subject of the suit. The mother did not want the child and did not want the father to have it; thus, the child could only become legitimate as to the father if the court consented.²⁶⁷ The wife and the sons were happy to welcome the child into the family, but the court nevertheless found that the father had not proven that the legitimation would be in the child's best interest.²⁶⁸ The trial court ordered the placement of the child with the Child Welfare Unit, and the appellate court affirmed.²⁶⁹ The appellate court further held that the gender-based distinctions of the father and mother in the Texas Family Code did not deny the father equal protection.²⁷⁰ The dissent argued that the holding denied equal protection.²⁷¹

264. *Id.* § 12.02 (Vernon Pam. Supp. 1986).

265. *Id.* § 15.03 (Vernon 1975).

266. *Id.* § 13.21 (Vernon Pam. Supp. 1986).

267. 697 S.W.2d at 486; see TEX. FAM. CODE ANN. § 13.21(c) (Vernon Pam. Supp. 1986).

268. 697 S.W.2d at 487.

269. *Id.*

270. *Id.* at 489.

271. *Id.* at 489-92 (Hill, J., dissenting).